FIRST DIVISION
March 23, 2015

No. 1-14-0366

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WELLS FARGO BANK, N.A., as Trustee for CARRINGTON MORTGAGE LOAN TRUST SERIES 2006-NC1 ASSET-BACKED PASS-THROUGH CERTIFICATES,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 11 CH 17553
AVALON BETTS-GASTON; LLOYD R. GASTON, JR.,	)	Honorable Robert Senechalle,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justice Cunningham concurred in the judgment.
Presiding Justice Delort specially concurred.

ORDER

Held: We must presume that the circuit court's summary judgment determination, which defendants challenged by filing two motions to reconsider, had a sufficient legal and factual basis due to defendants failure to present this court with an adequate record of the proceedings below. Accordingly, we affirm the judgment of the circuit court.

¶ 1 Plaintiff, Wells Fargo Bank, N.A., as Trustee for Carrington Mortgage Loan Trust Series 2006-NC1 Asset-Backed Pass-Through Certificates, brought this mortgage foreclosure action against defendants, Avalon Betts-Gaston and Lloyd R. Gaston, Jr., who had executed a promissory note with New Century Mortgage Corporation secured by a mortgage on property commonly known as 5259 Stanford Lane in Matteson, Illinois. New Century Mortgage Corporation assigned the note and mortgage to plaintiff.[1] The circuit court granted summary judgment and judgment of foreclosure and sale in plaintiff's favor. Defendants did not challenge the circuit court's summary judgment determination until after the order was entered. They subsequently filed two motions asking the circuit court to reconsider its summary judgment determination. In their first motion to reconsider, defendants alleged the circuit court misapplied existing law while in their second motion they alleged that a change in the law necessitated reconsideration. The circuit court denied both motions.

¶ 2 Defendants raise numerous issues for our review; all pertaining to their two motions for reconsideration. Defendants, however, failed to present this court with an adequate record of the circuit court's underlying summary judgment determination in order for us to review their motions to reconsider. Specifically, defendants failed to include plaintiff's motion for summary judgment; any responsive pleadings; or a transcript, bystander's report, or agreed statement of facts from the summary judgment hearing. Therefore, we must presume the circuit court's entry of summary judgment in plaintiff's favor had a sufficient legal and factual basis. Accordingly, we affirm the judgment of the circuit court.

[1] The circuit court entered an order of default against New Century Mortgage Corporation. New Century Mortgage Corporation is not a party to this appeal.

¶ 3 JURISDICTION

¶ 4 As discussed *infra*, defendants in this matter failed to present a sufficiently complete record for our review. Relevant to this section of our decision, defendants failed to present the circuit court's order approving the sale of the property and directing the distribution of the sale in this matter. This order is important because it is the final appealable order in a mortgage foreclosure proceeding. *See EMC Mortgage Corp. v. Kemp*, 2012 IL 113419, ¶42 ("In foreclosure proceedings *** the court's judgment does not become final and appealable until the sale has occurred and the court has entered orders approving the sale and directing the distribution."). Based on orders that are included in the record, however, it appears that the circuit court entered an order approving the report of sale and distribution on January 14, 2014. Furthermore, the parties agree that the circuit court entered the order approving the report of sale and distribution on that day. Defendants appealed on February 7, 2014. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 Defendants executed a promissory note with New Century Mortgage Corporation in the amount of $236,300 on October 5, 2005. The note was secured by a mortgage on property located at the common address of 5259 Stanford Lane, in Matteson, Illinois, 60443. New Century Mortgage Corporation assigned the mortgage and note to plaintiff. On November 19, 2008, defendants entered into a loan modification agreement whereby the principal balance increased to $246,968.47.

¶ 7 On May 13, 2011, plaintiff filed a complaint to foreclose the mortgage. Plaintiff attached a copy of the mortgage, note, and the loan modification agreement.

¶ 8 Defendants appeared *pro se* and on August 10, 2011, they filed a motion under section 2-619 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-619 (West 2010). Plaintiffs raised two arguments in support of their motion: (1) that plaintiff did not have standing to bring the cause of action; and (2) that plaintiff violated the Fair Debt Collection Practices Act. In response, plaintiff argued that defendants failed to carry their burden of proving a lack of standing and disputed their Fair Debt Collection Practices Act claim. Plaintiff also attached a copy of the assignment of the mortgage. The assignment indicated that New Century Mortgage Corporation assigned the mortgage to plaintiff. On September 28, 2011, the circuit court denied defendant's motion.

¶ 9 On October 25, 2011, Defendants answered plaintiff's complaint and filed affirmative defenses. Relevant here, defendants admitted that exhibits A, B, and C to plaintiff's complaint contained copies of the mortgage, note, and loan modification agreement. Defendants further admitted the relevant dates of the mortgage and loan modification agreement, their names as mortgagors, the amount of original indebtedness and the legal description and address of the property. Defendants denied that they were in default and that plaintiff was the legal holder of the indebtedness secured by the mortgage at issue in plaintiff's complaint. Defendants raised nine affirmative defenses: (1) plaintiff did not have standing to bring the cause of action; (2) plaintiff violated the Fair Debt Collection Practices Act; (3) plaintiff had "unclean hands" in the course of their dealing with defendants; (4) plaintiff violated the Truth in Lending Act; (5) plaintiff violated the Real Estate Settlement Procedure Act; (6) plaintiff violated the Home Ownership Equity Protection Act; (7) the note and mortgage were unenforceable because plaintiff committed fraud;

(8) plaintiff violated the Illinois Consumer Fraud and Deceptive Trade Practices Act; and (9) the terms of the note and mortgage were unconscionable.

¶ 10 On August 20, 2012, plaintiff filed the following motions: summary judgment, default, judgment of foreclosure and sale, an order appointing selling officer, and a dismissal of unknown owners and non-record claimants.[2]

¶ 11 On October 17, 2012, the circuit court conducted a hearing on plaintiff's summary judgment motion. Defendants did not appear. On that day, the circuit court entered summary judgment against defendants and a judgment of foreclosure and sale. The written summary judgment order stated that "the [c]ourt being duly advised in the premises." The circuit court also entered an order appointing a selling officer to conduct the sale of the property, dismissed unknown owners and non-record claimants, and entered an order of default against New Century Mortgage Corporation.

¶ 12 On November 13, 2012, defendants filed a combined motion to vacate the order of summary judgment entered against them and their own motion for summary judgment against plaintiff. In the section of their motion devoted to vacating the summary judgment order against them, defendants alleged the court erroneously entered summary judgment against them because plaintiff falsely represented that they had not filed an answer and that their answer and affirmative defenses raised issues of material fact precluding summary judgment. Defendants later acknowledged, in their motion for summary judgment, that plaintiff's summary judgment motion had been heard on October 17, 2012, but alleged that they did not receive a copy of the notice of the motion.

[2] The actual motions are not in the record. We know the above motions were filed on that date because plaintiff attached a copy of the notice of the motions, without the actual motions, as part of its response to defendants' first motion to reconsider the entry of summary judgment.

¶ 13 In the summary judgment portion of their motion, defendants raised the following arguments: (1) plaintiff's failure to answer their affirmative defenses constituted an admission of those defenses; (2) plaintiff was not the holder in due course of the note because the signature on the note "is not the signature it purports to be, that of Steve Nagy;" (3) the note is not a negotiable instrument and therefore plaintiff could not establish ownership of the note; (4) the endorsement on the note and its subsequent assignment were invalid because the original note holder filed for bankruptcy; (5) plaintiff failed to establish its standing to bring the cause of action as the holder of the note; (6) the endorsement and assignment of the note were improper under the trust documents; and (7) plaintiff failed to establish an effective transfer of ownership of the note and mortgage under New York law. Defendants also filed a memorandum in support of their motion for summary judgment in which they reasserted the arguments raised in their motion for summary judgment and added that any conveyance of the note and mortgage was void for contravening New York law and that plaintiff never properly established its ownership of the note.

¶ 14 On January 22, 2013, the court found defendant's combined motion to vacate the summary judgment order entered against them to be a motion to reconsider the October 17, 2012 summary judgment order.[3]

¶ 15 In accordance with the court's January 22, 2013 order finding defendants' motion to be a motion to reconsider, plaintiff filed a response on March 1, 2013. In its response, plaintiff pointed out defendants failed to appear at the October 17, 2012, summary judgment hearing. Plaintiff noted that its summary judgment motion addressed defendants' affirmative defenses and that it orally argued its position before the circuit court despite defendants' absence. Plaintiff argued in

[3] The record contains only the written order entered on January 22, 2013. The record also does not show that defendants objected to the circuit court treating their motion as a motion to reconsider.

response that defendants failed to meet the pleading requirements of a motion to reconsider because defendants failed to supply any new evidence, examples of changes in the law, or an error in the application of existing law. Plaintiff characterized defendants' motion as an expansion of their previously filed affirmative defenses without adding any newly discovered evidence or pointing out any misapplications of the law.

¶ 16 In reply, defendants acknowledged that the court was treating their motion as a motion to reconsider and argued that the circuit court erred in its application of the law to the facts of the case.

¶ 17 On March 29, 2013, the circuit court denied defendants' motion to reconsider finding that defendants failed to raise any newly discovered evidence, changes in the law, or errors of the application of the law to the facts of the case.

¶ 18 On April 15, 2013, defendants filed a motion seeking an interlocutory appeal, which they then withdrew on June 13, 2013.

¶ 19 On June 26, 2013, defendants filed another motion to reconsider arguing that the circuit court should reconsider its ruling on plaintiff's motion for summary judgment based on a change in the law. In support of their argument, defendants argued that on April 29, 2013, a New York trial court issued its decision in *Wells Fargo Bank, N.A. v. Erobobo*, 2013 WL 1831799 (N.Y. Sup. Ct. April 29, 2013). According to defendants, the matter at bar is governed by New York law and therefore the above decision is binding on the circuit court and shows that plaintiff cannot establish standing to bring this action.

¶ 20 On July 17, 2013, the circuit court denied defendant's second motion to reconsider finding that the *Erobobo* decision did not constitute a change of law in Illinois.

¶ 21 On October 28, 2013, plaintiff filed a motion for an entry of an order approving the report of sale and distribution and for an order of possession. The selling officer's report of sale and distribution indicated that a public sale of the property occurred on September 30, 2013, and that after factoring in the amount due to plaintiff and the total proceeds of the sale, a deficiency of $181,119.86 remained.

¶ 22 On January 14, 2014, the circuit court approved the sale of the property.[4] On that same day plaintiff filed a memorandum of judgment in the amount of $181,119.86.

¶ 23 On February 7, 2014, defendants filed an emergency motion to stay the enforcement of the order approving sale. On that same day, defendants also filed a notice of appeal.

¶ 24 On March 14, 2014, the circuit court entered an order granting defendants' motion to stay the enforcement of the money judgment against them during the pendency of the appeal, conditioned on defendants posting a bond.

¶ 25 ANALYSIS

¶ 26 Defendants, appearing before this court *pro se*, raise numerous issues for our review. For the sake of clarity, and in light of our ultimate conclusion in this case, defendants claims of error can be summarized as follows: (1) whether a decision from a New York trial court, *Wells Fargo Bank, N.A. v. Erobobo*, 2013 WL 1831799 (N.Y. Sup. Ct. April 29, 2013)) constitutes new controlling authority in this case; (2) whether the assignment of the note and mortgage to plaintiff was proper;[5] (3) whether they, as homeowners, have standing to challenge plaintiff's

[4] The order approving the sale of the property is not in the record. The parties agree that the circuit court approved the sale of the property on January 14, 2014. The March 14, 2014, order staying the enforcement of the money judgment against defendants also indicates that the circuit court entered an order approving the sale of the property.

[5] Defendants argue that the assignment of the note to plaintiff was improper for the following reasons: (1) plaintiff's alleged *ultra vires* acts are void under New York law for

ownership of the note and mortgage as either a third-party beneficiary or as a lien holder; (4) whether the signature on the note was made with the signer's permission; and (5) whether the circuit court failed to utilize the proper standard of review in granting summary judgment in plaintiff's favor.

¶ 27 Initially, we must address the procedural posture of this case because defendants frame their argument in manner that ignores the fact that they did not challenge plaintiff's motion for summary judgment prior to circuit court granting summary judgment in plaintiff's favor. Rather, defendants challenged the circuit court's order of summary judgment by filing two motions for reconsideration. "The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." *Landeros v. Equity Property & Development*, 321 Ill. App. 3d 57, 65 (2001). Defendants argued in their first motion to reconsider that the circuit court erred in its application of existing law, but argued in their second motion to reconsider that a change in the law necessitated reconsideration. Our review of both of defendants' motions to reconsider require us to review the underlying judgment that defendants sought to have the circuit court reconsider, *i.e.*, summary judgment in plaintiff's favor. The state of the record, however, prevents us from doing so.

¶ 28 The rules of appellate procedure are well established. It is duty of the appellant to present a sufficiently complete record to support a claim of error, including presenting a

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wasting trust assets; (2) plaintiff's alleged *ultra vires* acts are void under New York law because they were ratified without informed consent; (3) plaintiff had knowledge that the transfer of the note and mortgage violated the pooling and servicing agreement; (4) the assignment was improperly ratified (5) plaintiff is not the lawful owner of the note under Illinois law; (6) plaintiff failed to prove it was the rightful owner of the note; and (7) the assignment of the note and mortgage was improper because it was executed by way of a power of attorney.

transcript, or bystander's report, or agreed statement of facts. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003); see also Ill. S. Ct. R. 323 (eff. Dec. 13, 2008) (Illinois Supreme Court Rule addressing the presentment on appeal of a transcript, or bystander's report, or agreed statement of facts.) "In the absence of such a record, we will not speculate as to what errors may have occurred below." *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757 (2006). Any doubts as to the incompleteness of the record will be resolved against the appellant and we must presume that the relevant order had a sufficient legal and factual basis. *Rogers*, 204 Ill. 2d at 319; *Smolinski*, 363 Ill. App. 3d at 757-58 ("In fact, when the record on appeal is incomplete, a reviewing court should actually 'indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted correctly.' " (quoting *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985)). Where the circuit court is fully advised in the premises, the presumption of correctness of the circuit court's order is especially strong. *Smolinski*, 363 Ill. App. 3d at 758. Furthermore, unless the record demonstrates otherwise, we must presume that the circuit court heard adequate evidence to support its decision. *Webster v. Hartman*, 195 Ill. 2d 426, 433 (2001).

¶ 29 Defendants, as the appellants in this case, had the burden to present a sufficiently complete record to support their claims of error. *Rogers*, 204 Ill. 2d at 319. Defendants, however, failed to do so. Both of defendants' motions for reconsideration challenge the propriety of the circuit court's entry of summary judgment in plaintiff's favor on October 17, 2012. Logically, it follows that in order for this court to determine whether the circuit court properly denied defendants' motions for reconsideration, we must look to the underlying summary judgment proceedings. The record, however, only contains the written order of summary judgment. The order itself grants summary judgment in plaintiff's favor and states that

"the [c]ourt being duly advised in the premises." The order consists of a single page and does not put forth the circuit court's reasoning or any additional findings. The record before us does not contain plaintiff's motion for summary judgment, which presumably outlined its arguments in favor of summary judgment; any responsive pleadings, if filed; or a report of proceedings in accordance with Illinois Supreme Court Rule 323. Ill. S. Ct. R. 323 (eff. Dec. 13, 2008). The report of proceedings could have been a transcript, or a bystander's report, or an agreed statement of facts. Ill. S. Ct. R. 323 (eff. Dec. 13, 2008). Without a report of proceedings or the parties' pleadings on the motion for summary judgment, we cannot review the propriety of summary judgment in this matter because we do not know the reasons put forth in support of or against summary judgment or the reasoning the circuit court utilized in granting summary judgment. Accordingly, in the absence of this critical evidence, we must presume that the circuit court's entry of summary judgment in plaintiff's favor had a sufficient legal and factual basis. *Rogers*, 204 Ill. 2d at 319. This is especially true in this matter where the order granting summary judgment indicated that "the [c]ourt being duly advised in the premises." *Smolinski*, 363 Ill. App. 3d at 758. It follows that we must affirm the denial of defendants' two motions for reconsideration because both motions address the entry of summary judgment, which we must presume was correctly decided due to defendants' failure to present an adequate record.

¶ 30 We additionally point out that defendants also failed to present a report of proceedings for their two motions for reconsideration. The record does contain defendants' two motions for reconsideration, and plaintiff's response to defendants' first motion to reconsider, but they do not shed much light on what occurred at the summary judgment hearing other than defendants failed to appear at the summary judgment hearing and that plaintiff orally argued its motion despite defendants' absence. We will not speculate as to what occurred at those hearings. *Smolinski*,

363 Ill. App. 3d at 757. Accordingly, the sections of the record covering defendants' motions to reconsider also do not provide an adequate record of the underlying summary judgment order.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 33 Affirmed.

¶ 34 PRESIDING JUSTICE DELORT, specially concurring:

¶ 35 I join the panel's order in full, but also write separately to add some reflections on this case. We resolve this case on a technicality. The clerk of the Circuit Court of Cook County apparently failed to include all of the pleadings in the appellate record, and the Gastons neither noticed these omissions nor did anything to have the record supplemented. I do not agree with the majority that lack of transcripts of the arguments on summary judgment or the two motions to reconsider is critical here, because our review is *de novo* and no witnesses would have testified at those hearings. I do, however, agree that the omissions of the crucial motion for summary judgment and the order approving sale are fatal to the appeal. Their absence slipped by not only the defendants' notice, but the plaintiff's as well. Wells Fargo's brief argues the merits of the defendants' myriad claims without ever mentioning that the two most crucial items were missing from the record. The continuing inability of the clerk below to prepare accurate records manifestly affects our ability to promptly and correctly adjudicate appeals, creates undue expense, and wastes the time of attorneys and litigants.

¶ 36 That being said, I wish to briefly address the merits of the Gastons' appeal to illustrate why their arguments are fatally flawed. This appeal raises a host of variations on the same theme, which those involved in foreclosure law call the "New York Trust" defense. The basic premise of

this defense is that the transfer of the loan from one entity to another was not accomplished in strict accordance with the pooling and servicing agreement between the two entities. The Gastons were not parties to that agreement, and the entities that were parties claim no error or prejudice by their (alleged) failure to accomplish the transfer in the manner the Gastons suggest was required. The Gastons singularly rely on an unpublished trial court decision from New York, *Wells Fargo Bank, N.A. v. Erobobo*, 39 Misc. 3d 1220(A), 972 N.Y.S.2d 147 (Sup. Ct. 2013). *Erobobo* suggests that such defects in the transfer process might render it difficult for a lender to prevail in a foreclosure case through summary judgment. The Gastons repeatedly insist that the *Erobobo* decision is the only word on the subject and that it is binding on this court. It most certainly is not. "We are only obliged to follow the decisions of the Supreme Court of Illinois and of the United States Supreme Court, as both of these tribunals exercise appellate jurisdiction over the Appellate Court of Illinois." *People v. Leavitt*, 2014 IL App (1st) 121323, ¶ 48. A simple search on Westlaw reveals that over 40 courts have declined to follow, or distinguished, *Erobobo*. In fact, "the vast majority of courts to consider the issue have rejected *Erobobo*'s reasoning." *Butler v. Deutsche Bank Trust Co. Americas*, 748 F.3d 28, 37 (1st Cir. 2014). It is also worth noting that our colleagues in the Second District of this court have rejected the New York Trust defense. *Bank of America v. Bassman*, 2012 IL App (2d) 110729.

¶ 37 The simple facts before us are these. An order in the record shows that on September 28, 2011, the plaintiff's attorney brought the original note to open court and it was displayed to Betts-Gaston, who was present. The face of the note shows that it was indorsed in blank. Under Illinois law, possession of a note made payable to bearer is *prima facie* evidence of title thereto, and of the right to foreclose. *Parkway Bank v. Korzen*, 2013 IL App (1st) 130380, ¶ 24; see also 810 ILCS 5/3-205 (West 2012). The Gastons claim that, because of the allegedly improper

transfer, they might be subject to having to pay the loan back twice. This argument is not merely conjectural; it is pure sophistry. The Gastons' loan, which requires monthly payments, has been delinquent since October 2010 – almost five years. During that time, no one other than the plaintiff has come forth to collect on it. See *Rajamin v. Deutsche Bank National Trust Co.*, 757 F.3d 79, 85 (2d Cir. 2014) ("plaintiffs' challenge to defendants' claim of ownership of plaintiffs' loans, implying that the loans are owned by some other entity or entities, is highly implausible, for that would mean that since 2005 there was no billing or other collection effort by owners of loans whose principal alone totaled $3,776,000. The suggestion that plaintiffs were in imminent danger or, indeed, any danger of having to make duplicate loan payments is thus entirely hypothetical."). Accordingly, the ultimate result would be the same even if we were to consider the merits of this appeal.

¶ 38 In *Hatchett v. W2X, Inc.*, 2013 IL App (1st) 121758, this court considered an appeal of a case filed against the defendant here, Avalon Betts-Gaston, involving Betts-Gaston's alleged commission of legal malpractice and breach of fiduciary duty against her client, who was a homeowner in peril of foreclosure. We remanded the case for further proceedings, upon determining that the trial court prematurely terminated those counts. *Id.* ¶ 67. Betts-Gaston has since been disbarred for misconduct related to her involvement with certain real estate transactions. *In re Avalon e'lan Betts-Gaston*, Ill. S. Ct. M.R. 25529 (Nov. 19, 2012). I mention this simply to highlight that Betts-Gaston has legal training and is thus familiar with applicable procedures, including the need to proofread the appellate record and the basic principles of how vertical *stare decisis* operates in courts of review. Therefore, this case does not present, as the Gastons suggest, unsophisticated homeowners victimized by improper banking practices. They

have ably used the legal system to delay the inevitable for years, and it is now time for their case to come to a belated end.